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E-FILED on 11/05/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HOUSTON CASUALTY COMPANY,

No. C-07-01188 RMW

Plaintiff,

v.

INTERNATIONAL GRAND TOURS, INC.;
NORMAN RONNIE HANSEN a/k/a
NORMAN RONNIE HANSEN, JR. a/k/a RON
HANSEN; and DOES 1 to 10,

ORDER GRANTING INTERVENORS'
MOTION TO FILE AMENDED
COMPLAINT; ORDER GRANTING
MOTION TO QUASH SERVICE AND SET
ASIDE DEFAULT

Defendants,

EDWARDSVILLE [ILL] COMMUNITY
SCHOOL DISTRICT NO. 7, on Its Own
Behalf and as Assignee for Katie Bachman, et
al.,

[Re Docket Nos. 68, 103]

Intervenors.

On May 2, 2008, plaintiff Houston Casualty Company ("HCC") moved for summary judgment seeking a declaratory judgment and rescission and reformation of an insurance policy held by defendant International Grand Tours ("IGT"). Edwardsville [Ill] Community School District No. 7 ("School District") intervened on behalf of thirty-three individuals claiming rights under that insurance policy, and now moves to amend its original complaint. After having default entered against him on August 3, 2007, defendants Norman Ronnie Hansen ("Hansen") and IGT

ORDER GRANTING INTERVENORS' MOTION TO FILE AMENDED COMPLAINT; ORDER GRANTING MOTION TO QUASH SERVICE AND SET ASIDE DEFAULT—No. C-07-01188 RMW
JAS

1 now seek to quash service of HCC's complaint and set aside the default entered against them. For
 2 the reasons stated below, the court grants School District's motion for leave to amend and
 3 defendants' motions to quash service and set aside the entry of default. Accordingly, consideration
 4 of plaintiff's motion for summary judgment will be postponed to permit defendants to respond.

5 **I. BACKGROUND**

6 Defendant IGT was a travel agency specializing in educational tourism. Defendant Ronnie
 7 Hansen served as President of IGT. Decl. of Ron Hansen in Support of Mot. to Quash ("Hansen
 8 Decl.") ¶ 2. IGT started its business in 2004 and ceased operation in 2005. Compl. for Decl.
 9 Judgment by HCC ("HCC Compl.") ¶ 6. In 2004, defendant Hansen negotiated to purchase the
 10 assets of JM Travel Selections, Inc. ("JM Travel"), another educational travel company, owned by
 11 Joseph and Sharon Maloof ("Maloofs"). *Id.* ¶ 9. The Maloofs had been operating JM Travel since
 12 at least the late 1990s. Compl. for Decl. Relief by School District ("School District Compl.") ¶ 14.
 13 The result of the negotiation was an oral purchase agreement between the Maloofs and Hansen.
 14 As part of the agreement, the Maloofs were to sell their entire customer database and other
 15 intellectual property to IGT, and IGT would employ the Maloofs as its directors of operations and
 16 sales. *Id.* ¶ 10. The Maloofs started working for IGT, and their customers were notified of the
 17 transition. School District Compl. ¶ 20. Soon afterward, IGT began canceling pre-paid trips. *Id.* ¶
 18 11. It notified participants that they could receive a refund, which many took. *Id.* However, IGT
 19 failed to issue refunds as promised, so many customers filed suit against defendants, or made
 20 claims directly against HCC as IGT's insurer.¹ *Id.* ¶ 12.

21 IGT held a Professional Liability Errors & Omissions Insurance Policy, Policy No. H704-
 22 16117 ("Policy"), with limits of liability of \$5,000,000 per claim. The Policy provides coverage
 23 for "any Claim first made against the insured" between October 19, 2004 and October 19, 2005,
 24 subject to a Retroactive Date of October 19, 2003 ("Policy Period"). *Id.* ¶¶ 25-26.

25 On February 28, 2007, HCC filed a complaint for declaratory relief on various grounds,
 26 seeking rescission of the Policy due to fraud, misrepresentation and concealment of material facts

27 ¹ HCC's complaint notes that at least five suits have been filed against Hansen and IGT and that
 28 numerous claims against defendants have been submitted directly to HCC. HCC Compl. ¶¶ 15-24.

1 and an injunction preventing IGT and Hansen from pursuing any claim against HCC regarding the
2 policy. *See id.* ¶¶ 52-58. On July 31 and August 28, 2007, HCC obtained a clerk's entry of default
3 against all defendants. Mot. for Default Judgment, Exs. A-C. Since defendants never answered or
4 otherwise responded to HCC's complaint, on October 9, 2007, HCC moved for default judgment
5 pursuant to Fed. R. Civ. P. 54(c) for all the relief requested in HCC's complaint for declaratory
6 judgment, including an award of costs. Mot. for Default Judgment at 5.

7 On September 25, 2007, before HCC moved for default judgment, the School District,
8 having submitted a claim to HCC, moved to intervene, seeking declaratory relief against HCC.
9 The School District alleges that a group of students and teachers from the School District
10 ("Spanish Club") had a trip planned for late spring of 2005. Around March 2004, the Spanish
11 Club sent JM Travel an initial deposit. *Id.* ¶¶ 19-20. In September 2004, the club received an
12 undated letter from Joseph Maloof stating that he had decided to cease JM Travel's operation, and
13 he wanted to introduce the Spanish Club to IGT. The Maloofs promised the Spanish Club that
14 their contractual arrangements with JM Travel would continue with IGT, and that IGT would be a
15 more efficient and better operation. *Id.* ¶ 21. Later, IGT sent a letter to the Spanish Club, stating
16 that most of JM Travel's staff had joined IGT, and IGT made the same promises as the Maloofs
17 had made. *Id.* ¶ 22. Thereafter, the Spanish Club members completed new applications and
18 forwarded further payments to IGT as instructed. *Id.* ¶¶ 23-25.

19 Beginning in December 2004, the Spanish Club began having surcharge problems with
20 IGT. *Id.* ¶ 29. On May 19, 2005, Hansen notified the Spanish Club that their trip was canceled,
21 and informed the members that they could receive a refund. *Id.* ¶¶ 32-36. All members requested
22 a refund, but IGT has not issued any refunds to members of Spanish Club. *Id.* ¶¶ 37-38.

23 On September 12, 2006, the School District filed an action in the Superior Court of Santa
24 Clara County, Case No. 106-CV-070951, against IGT and Hansen, seeking recovery based on
25 negligence, breach of statutory duty and negligent misrepresentation ("State Action"). *Id.* ¶ 40.
26 Hansen defaulted in the State Action. *Id.* ¶ 45. Because Applicants believe that their losses are
27 insured under the Policy, they moved to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2),
28 seeking declaratory judgment that their recovery in the State Action are losses covered by the

1 Policy. *Id.* at 10; Mot. for Intervention at 3. The court granted the School District's motion to
2 intervene. On April 2, 2008, the School District obtained a default judgment in the State Action,
3 and now seeks leave to amend their complaint to assert the direct action against HCC that they
4 assert the default judgment affords them.

5 In the meantime, Hansen has resurfaced. Between January 2007 and January 2008, Hansen
6 was living on a sailboat in the Mediterranean. Hansen Decl. ¶ 10. He returned after discovering
7 that there was a warrant out for his arrest, and upon landing in San Francisco, was promptly
8 arrested. *Id.* ¶ 17. After his release from jail in May 2008, he discovered the instant lawsuit
9 against him.² *Id.* ¶ 18. Hansen now moves to quash service of the summons and complaint, set
10 aside default, and modify the case schedule so he may have an opportunity to respond.

11 12 II. ANALYSIS

13 A. Intervenor's Motion to File Amended Complaint

14 As an initial matter the parties disagree as to the applicable legal standard. IGT argues that
15 Federal Rule of Civil Procedure 15's permissive amendment rule applies to their motion, while
16 HCC contends that because any amendment would require modification of the scheduling order,
17 Rule 16(b)(4) applies, and "good cause" must be shown. HCC does not, however, articulate why
18 the sought leave to amend necessitates a schedule change. In fact, the court's July 9, 2008 Order
19 Continuing Briefing Schedule set out to allow briefing of the motion for leave to amend without
20 modifying the summary judgment schedule. As the court pointed out in that order, "because
21 HCC's motion for summary judgment is directed toward HCC's claims against defendants IGT and
22 Hansen, any amendment to the complaint in intervention should not raise any additional issues to
23 be addressed with regard to HCC's outstanding motion for summary judgment." Rule 15 therefore
24 applies to IGT's motion for leave to amend.

25
26
27 ² Hansen's declaration states that he discovered the summons and complaint in January of 2008.
28 But it also suggests that he did not see the summons until after his return to the United States in
March of 2008. Reading the declaration chronologically, the January 2008 statement appears to be
an error.

1 Federal Rule of Civil Procedure 15 governs the amendment of complaints. It states that if a
2 responsive pleading has already been filed, the party seeking amendment "may amend its pleading
3 only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a).
4 Generally, leave shall be freely given "when justice so requires." *Id.*; *Eminence Capital, LLC v.*
5 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). This rule reflects a strong underlying policy
6 that favors determination of cases on their merits, and not on the technicalities of pleading rules.
7 *See Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Accordingly, the court must be very liberal in
8 granting leave to amend a complaint. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708,
9 712 (9th Cir. 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th
10 Cir. 1990) (leave to amend granted with "extreme liberality"). Nevertheless, leave is not to be
11 granted automatically. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).
12 Whether to allow leave to amend is within the discretion of the district court. *Id.* A district court
13 may deny a party's request to amend a pleading where the amendment: (1) produces an undue
14 delay in litigation; (2) is sought in bad faith or with dilatory motive; (3) unduly prejudices the
15 adverse party; or (4) is futile. *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 465 F.3d 946, 951
16 (9th Cir. 2006).

17 HCC opposes the amendment not because it satisfies any of the above criteria, but because
18 prejudice should be presumed from School District's "unexplained" delay. In deciding whether to
19 grant leave to amend, a district court may consider the factor of undue delay, but delay alone
20 cannot justify denying a motion to amend. *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999).
21 Furthermore, prejudice is the most important and common reason for denying leave to amend.
22 *Eminence*, 316 F.3d at 1052. To justify denial of leave to amend, the prejudice must be
23 substantial. *Morongo*, 893 F.2d at 1079. There has been some delay here, but only slightly
24 prejudicial if at all. School District filed a document on May 1, 2008 purporting to be, but not
25 including, a motion for leave to amend. School District then properly filed the instant motion on
26 June 27, 2008. The delay, although without justification, has not meaningfully prejudiced HCC.
27 HCC does argue that School District's delay "jeopardizes Houston's ability to obtain a ruling on its
28 summary judgment motion . . ." This concern does not justify refusing an amendment because

1 the School District is merely adding a new claim based upon its recent judgment against Hansen
2 and IGT in California state court. The court therefore grants School District's motion for leave to
3 amend.

4 **B. Motion to Quash Service and Set Aside Default**

5 Plaintiffs claim that service was effective under Rule 4(e)(2)(B), which governs service of
6 process on individuals in the United States. The rule states that a person may be served by
7 "leaving a copy . . . at the individual's dwelling or usual place of abode with someone of suitable
8 age and discretion who resides there." Fed. R. Civ. P. 4(e)(2)(B). Without proper service under
9 Rule 4, the court lacks personal jurisdiction over the defendants, independent of any actual notice
10 defendants might have received. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982).

11 Hansen claims that service was inadequate on two grounds: First, that 812 Palm Avenue
12 was not Hansen's "dwelling or place of usual abode;" and second that Ding Yo Ling was not a
13 person of "suitable age and discretion" to receive service. Hansen further argues that service on
14 IGT was inadequate because the requirements of Rule 4(h) were not satisfied.

15 **1. Service on Norman Ronnie Hansen**

16 **a. Was 812 Palm Avenue Hansen's "dwelling or usual place of abode"?**

17 According to Hansen's declaration he did not reside at 812 Palm Avenue in May of 2007.
18 From January 2007 through January 2008, he alleges, he lived on a sailboat, docked intermittently
19 at various Mediterranean ports of call. Kevan Kurt ("Kurt"), the process-server, issued a
20 declaration stating that he "conducted online research and developed information that Mr. Hansen
21 was receiving mail at 812 Palm Avenue" and that he concluded, based on observing Hansen's wife,
22 children, and mother-in-law arriving at and leaving the property. However, taking Hansen's
23 statements as true, a factual question arises as to whether the service on Hansen was ineffective
24 under Rule 4(e)(2) because 812 Palm Avenue was not, at the time, Hansen's "dwelling or usual
25 place of abode."

26 **b. Was the summons and complaint left with a person "of suitable age and
27 discretion"?**

1 Kurt's declaration also states that he left the summons and complaint with Ding Yo Ling,
2 Hansen's mother-in-law, and gave her directions, translated by Hansen's minor children, which he
3 interpreted her to have understood. Here, plaintiffs argue not that any of the children or Ms. Ling
4 individually were of sufficient age and discretion to receive service, but rather that, together, the
5 children and Ms. Ling were competent to receive service. This is implausible. While fluency in
6 English is not necessary to receive service, *see Boston Safe Deposit and Trust Co. v. Morse*, 779
7 F.Supp. 347, 350 (S.D.N.Y. 1991), relying on children to translate is insufficient, particularly
8 when the person receiving service may not understand the nature and importance of the delivered
9 documents. Ms. Ling is therefore not of suitable age and discretion to receive service.

10 **2. Service on International Grand Tours**

11 Service on a corporation is governed by Rule 4(h). HCC does not claim to have served
12 IGT in accordance with Rule 4(h)(1)(B), which requires service on a person authorized to receive
13 service on behalf of a corporation. Therefore, service on IGT must have been under Rule
14 4(h)(1)(A). California law requires that service on a corporation be delivered to a designated agent
15 or officer of the corporation. 50A Cal. Jur. 3d Process, Notices, and Subpoenas § 46 (citing
16 Cal.C.C.P. § 416.10). Ms. Ling is neither a designated agent or officer. HCC's service on IGT
17 was therefore ineffective.

18 **3. Motion to Set Aside Entry of Default**

19 Federal Rule of Civil Procedure 55(c) permits a court to set aside an entry of default for
20 good cause. As the Ninth Circuit wrote in *Mendoza v. Wight Vineyard Management*, 783 F.2d
21 941, (9th Cir. 1986): "The court's discretion is especially broad where, as here, it is entry of default
22 that is being set aside, rather than a default judgment. *See Meehan v. Snow*, 652 F.2d 274, 276 (2d
23 Cir.1981). A decision on a motion to set aside a default is not an abuse of discretion unless the
24 court is "clearly wrong" in its determination of good cause. *Provident Security Life Insurance Co.*
25 *v. Gorsuch*, 323 F.2d 839, 842 (9th Cir.1963)."

26 Hansen has states in a supplemental declaration that he did not know about the instant
27 lawsuit until he discovered the summons and complaint in May of 2008. HCC states in its motion
28 that "Houston's counsel spoke with Mr. Hansen over 4-5 months ago regarding the default and

1 spoke about Houson's summary judgment motion." However, the statement is not supported by a
2 declaration. In any event, doubts should be resolved in favor of setting aside a default so the case
3 may be resolved on the merits. *Lichtenstein v. Jewelart, Inc.*, 95 F.R.D. 511 (E.D.N.Y. 1982).
4 Further, here the service was defective so the entered default was void.

5

6 **III. ORDER**

7 For the foregoing reasons, the court grants intervenor's motion for leave to amend
8 and grants defendant's motions to quash service and set aside the entry of default. HCC shall
9 respond to the amended complaint in intervention by within 20 days and defendants Hansen and
10 IGT shall respond to the complaint within 20 days. The hearing on the motion for summary
11 judgment is taken off calendar without prejudice to its being re-noticed.

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14 DATED: 10/22/08

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RONALD M. WHYTE
United States District Judge

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1 **Notice of this document has been electronically sent to:**

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11 registered for e-filing under the court's CM/ECF program.

12 **Dated:** 11/05/08

13 JAS
14 Chambers of Judge Whyte